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RECEIVED
NOV 17 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **RM-9101** -- Notice of Written Ex Parte Communications in the Petition for Expedited Rulemaking of LCI International Telecom Corp. and Competitive Telecommunications Association to Establish Technical Standards for Operations Support Systems

Dear Mr. Caton:

The Independent Telephone & Telecommunications Alliance hereby files an original and two copies of this written ex parte presentation in the above captioned proceeding. Copies of this written ex parte presentation have been served upon all parties of record in this proceeding. Please contact me with any questions.

Sincerely,

R. B. M.

R. Paul Margie

cc: **Jake Jennings**
Radkika Karmarkar
Wendy Lader
Brent Olsen
Florence Setzer

0.2

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition for Expedited Rulemaking of)
LCI International Telecom. Corp. and)
Competitive Telecommunications Association)
to Establish Technical Standards for)
Operations Support Systems)

CC Docket No. 96-98
RM 9101

To: The Commission

**EX PARTE COMMENTS OF THE INDEPENDENT
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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LCI International Telecom. Corp. and)	RM 9101
Competitive Telecommunications Association)	
to Establish Technical Standards for)	
Operations Support Systems)	

To: The Commission

**EX PARTE COMMENTS OF THE INDEPENDENT
TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

At the invitation of the Commission, the Independent Telephone & Telecommunications Alliance ("ITTA") hereby files its comments in response to the *ex parte* presentation of LCI International Telecom Corporation ("LCI") in the above-captioned docket. In an oral presentation to the Staff on September 26, 1997, and written follow up on September 29, LCI urged the Commission to impose new operations support system ("OSS") service quality measurement obligations on incumbent local exchange carriers ("ILECs"). ITTA submits that LCI has presented no legal or factual justification for burdening ILECs with any additional requirements for the delivery or measurement of OSS.

I. INTRODUCTION AND SUMMARY

The Commission lacks the authority to impose the OSS requirements sought by LCI. In *Iowa Utilities Board v. FCC*, the Eighth Circuit made clear that the FCC does not have the power to force ILECs to offer competitive local exchange carriers (“CLECs”) interconnection of a quality superior to that it provides to itself.¹ Accordingly, the Commission should reject both LCI’s Petition for Expedited Rulemaking (“LCI Petition”) and its subsequent *ex parte* filing.

The Commission should in particular refuse to require ILECs to adopt the practices detailed in the “Service Quality Measurements Detail” document prepared by the Local Competition Users Group (“LCUG Document”). The LCUG Document’s proposed reporting and measurement requirements are extremely burdensome and poorly designed, and they will, as a result, interfere with ILEC efforts to provide reasonable access to OSS for CLECs.

If, notwithstanding its lack of authority and the ill-advised nature of the LCUG requirements, the Commission nonetheless declines to wholly deny LCI’s requests, it should as a minimum not impose uniform OSS obligations on all LECs. A separate, properly tailored set of OSS requirements should be created for mid-size LECs in recognition of the significant differences in terms of resources and other factors between these carriers and large LECs. This is consistent with the statutory recognition that rural companies and companies with less than two percent of nationwide lines should face less onerous interconnection requirements.²

¹ 120 F.3d 753 (1997) (“*Iowa Utilities Board*”).

² 47 U.S.C. § 251(f).

It is also in line with myriad FCC decisions differentiating between smaller carriers and larger carriers in terms of regulatory burdens.

For all these reasons, the FCC should terminate this proceeding without action, or, in the alternative, refuse to impose OSS additional requirements, including reporting and performance standards, on mid-size LECs.

II. THE COMMISSION HAS NO AUTHORITY TO IMPOSE BURDENSOME NEW OSS REQUIREMENTS ON INCUMBENT LOCAL EXCHANGE CARRIERS IN THE GUISE OF PERFORMANCE MEASUREMENT OBLIGATIONS OR OTHERWISE

A. The *Iowa Utility Board* Decision Reveals that Section 251 Does Not Give the Commission Authority To Impose New OSS Requirements

After *Iowa Utilities Board*,³ it is clear that the Commission lacks the authority to grant the LCI Petition in its original form or as supplemented by its recent *ex parte* filing. The United States Court of Appeals for the Eighth Circuit stated that “nothing in the [Telecommunications] Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of sections 251 and 252.”⁴ The court found instead that “state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252.”⁵

³ 120 F.3d 753.

⁴ *Id.* at 804.

⁵ *Id.*

Equally importantly, the court held that the Commission could not require ILECs to provide CLECs with interconnection or unbundled network elements that are of superior “quality to that provided by the local exchange carrier to itself.”⁶ Section 251(c)(4) requires only that unbundled network elements be of equal quality with those the ILEC provides to itself. This requirement forecloses any Commission effort to mandate national standards that would force ILECs to offer above-parity OSS.

As explained in ITTA’s Reply Comments in this proceeding,⁷ the LCI Petition runs afoul of the Eighth Circuit’s mandate because it calls for the Commission to impose OSS requirements that are different and far more expansive than that which ILECs provide to themselves. CLEC comments calling for the adoption of a “commercially reasonable” OSS standard echo this same unlawful demand.⁸ The LCUG Document’s “Service Quality Measurements” proposal likewise would force ILECs to provide CLECs with OSS reports and calculations of much greater detail and scope than those currently performed. Because it lacks the authority to impose such above-parity requirements on ILECs, the Commission must deny the LCI Petition and refuse to adopt the LCUG Document’s proposals.

⁶ 47 U.S.C. § 251(c)(2)(C).

⁷ Reply Comments of the Independent Telephone & Telecommunications Alliance, CC Docket No. 96-98, 5-7 (July 30, 1997) (“*ITTA Reply Comments*”).

⁸ *Id.*

B. No Other Provision of the Telecommunications Act Grants the Commission Authority to Impose the OSS Requirements Sought by CLECs

The remaining provisions of the Telecommunications Act, like Section 251, also do not give the Commission the power to adopt LCI's or LCUG's OSS proposals.⁹ Section 2(b) reserves authority over "intrastate communication service" for the states – not for the Commission. The Supreme Court has held that only a direct grant of specific jurisdiction over intrastate communication service by Congress can supersede Section 2(b).¹⁰ The Eighth Circuit reiterated this holding in *Iowa Utilities Board*, stating that "the Supreme Court emphasized that section 2(b) constitutes an explicit congressional denial of power to the FCC and suggested that Congress could override section 2(b)'s command only by unambiguously granting the FCC authority over intrastate telecommunications matters or by directly modifying section 2(b)." ¹¹

The Telecommunications Act included no such express grant of authority over intrastate telecommunications and did not modify Section 2(b). In fact, in rejecting the FCC's "pick and choose" rule, the Eighth Circuit found that Congress did just the opposite by specifically maintaining Section 2(b)'s proscription against FCC jurisdiction.¹² If the FCC

⁹ See *ITTA Reply Comments* at 7-10 for a more complete discussion of this issue.

¹⁰ *Louisiana Public Service Comm'n v. FCC*, 476 US 355, 377 (1986).

¹¹ 120 F.3d at 796 (citing *Louisiana Public Service Comm'n v. FCC*, 476 US at 377).

¹² *Id.* at 800-01.

adopts the national OSS standards proposed by LCI and LCUG it will unlawfully interfere with the states' authority over intrastate telecommunications.

III. IF THE COMMISSION NONETHELESS SEEKS TO ESTABLISH NEW OSS REQUIREMENTS, IT MUST RECOGNIZE THAT ONE-SIZE-FITS-ALL REGULATION IS INEFFICIENT, UNWORKABLE, AND WILL INJURE COMPETITION

The Commission must account for the financial, technical, and operational differences between large ILECs and the mid-size carriers that comprise ITTA if it nonetheless determines to impose new OSS standards or measurement requirements. As discussed in the ITTA Reply Comments, a national one-size-fits-all standard will disproportionately injure mid-size ILECs.¹³ The continued vitality of these carriers is critical for effective competition in many parts of the country. In the interest of promoting competition in mid-size carrier territories, as well as administrative efficiency and rational decisionmaking, the Commission must therefore develop an OSS program that does not bury mid-size carriers under financial responsibilities and technical requirements that are only appropriate for large carriers.

Mid-size carriers have fewer customers and less revenue than the large ILECs and many of the CLECs now demanding new OSS requirements and performance measurements. Mid-size carriers have less staff and technical resources than these large telecommunications companies. Furthermore, mid-size LECs can lag far behind larger carriers in the deployment of technology used for OSS functions in their own systems.

¹³ *ITTA Reply Comments* at 14-16.

All these factors combine to put ITTA members at a distinct disadvantage in complying with national OSS requirements, performance standards and reporting requirements compared to large ILECs and CLECs. For example, there are substantial, fixed, up-front costs associated with a one-size-fits-all OSS standard that will be particularly burdensome for mid-size carriers. For some mid-size ILECs, meeting a national OSS standard will require complete replacement of all or large portions of existing OSS systems. Not only is this time-consuming, but it imposes unnecessary costs on existing ratepayers. In addition, updating OSS systems involves substantial person-hours to modify software and install hardware computer terminals and support systems, in addition to hiring additional personnel to perform the substantial upgrades required. The CLECs demanding that ILECs incur these costs have not offered to pay for them.

Additionally, number portability will geometrically increase the technical problems and costs of creating OSS interfaces for mid-size carriers. Number portability, which must be rolled out on a city-by-city schedule established by the Commission, will significantly complicate OSS. New fields in data files, associated software modifications, and interaction with distant databases is necessary in a number portability environment. Given that number portability systems are not completely in place, it is impossible now to know all of the changes required in this environment. Modifying OSS now to accommodate existing needs, just to modify them again once number portability is instituted, is wasteful and will result in consumer disruptions and confusion, not to mention the added costs associated with constant revisions.

Indeed, the Act itself recognizes that different treatment must be afforded mid-size LECs that are rural or that have less than 2% of nationwide access lines.¹⁴ In addition, the Commission has consistently imposed less burdensome requirements on mid-size carriers in situations where a regulatory system disproportionately affects smaller companies. The following list covers only some of the myriad examples of past Commission action tailored appropriately to carrier size and resources:

- *Accounting requirements*: The Commission's Part 32 accounting requirements are less stringent for smaller carriers. Companies with annual revenues from regulated telecommunications operations that are less than the indexed threshold¹⁵ are subject to fewer accounting rules than are companies with revenues above the threshold.¹⁶
- *Access tariff filings*: LECs serving 50,000 or fewer access lines in a given study area, and that qualify as subset 3 carriers,¹⁷ have the flexibility of submitting access tariff filings for that study area pursuant to either 47 C.F.R. § 61.38 or § 61.39.
- *Optional incentive regulation*: Commission rules on optional incentive regulation ("OIR") permit less onerous regulation than full price cap regulation for smaller carriers.¹⁸
- *Cost allocation manuals*: Only LECs with annual operating revenues equal to or above the indexed revenue threshold must file cost allocation manuals ("CAMs") with the Commission.¹⁹

¹⁴ 47 U.S.C. § 251(f).

¹⁵ The indexed revenue threshold for a given year is "\$100 million, adjusted for inflation, as measured by the Department of Commerce Gross Domestic Product Chain-Type Price Index (GDP-CPI), for the period from October 19, 1992 to the given year." 47 C.F.R. § 32.9000.

¹⁶ 47 C.F.R. § 32.11.

¹⁷ Subset 3 carriers are described in 47 C.F.R. § 69.602.

¹⁸ 47 C.F.R. § 61.50.

¹⁹ 47 C.F.R. § 64.903.

- *Equal access:* The Commission's equal access requirements are less stringent for smaller carriers.²⁰
- *Service quality reporting:* Reporting requirements for service quality are less stringent or nonexistent for mid-size carriers.²¹

The Commission, as demonstrated above, has a long and consistent history of accommodating the different resources, technology, and customer bases of smaller carriers. It should continue to recognize and act upon these differences in the OSS environment.

IV. THE COMMISSION MUST FURTHER REJECT LCUG'S PROPOSED "SERVICE QUALITY MEASUREMENT" REQUIREMENTS BECAUSE THEY ARE EXCESSIVELY BURDENSOME AND POORLY CONCEIVED

ITTA supports reasonable OSS service quality measurements that are established by state commissions. As explained above, however, the FCC does not have the authority to impose such requirements. On this basis alone, the Commission should take no further action.

If the Commission nonetheless attempts to enact national service quality measurement regulations, it should flatly reject LCUG's proposals. The proposed reporting and measurement standards are overly burdensome, frequently inappropriate or ineffective, and would detract from ILECs' ability to provide quality OSS services to CLECs. LCUG has not justified, and cannot justify, the enormous resources that ILECs would have to expend to

²⁰ *MTS and WATS Market Structure Phase III*, 100 F.C.C. 2d 860 (1985) (Report and Order).

²¹ *See, generally, Policy and Rules Concerning Rates for Dominant Carriers and Amendment of Part 61 of the Commission's Rules to Require Quality of Service Standards in Local Exchange Carrier Tariffs*, 12 FCC Rcd 8115 (1997) (Memorandum Opinion and Order).

perform the proposed studies. In fact, adopting the proposal would undermine ILEC efforts to provide CLECs with reasonable access to OSS by diverting resources necessary for developing and implementing those systems.

A. The LCUG Document's Proposed Reporting and Measurement Requirements Are Extraordinarily Burdensome

The breadth of LCUG's proposed requirements is astonishing. The plan lists detailed measurement programs for twenty-seven service quality issues for ILECs to perform monthly.²² All ILECs would perform these measurements for at least fifteen different types of service offerings²³ – meaning that every ILEC would perform *hundreds of studies every month* for each wire center and for each CLEC. As noted by the Southern New England Telephone Company ("SNET"), when this number is multiplied by the total number of wire centers and CLECs operating in Connecticut alone SNET would be forced to produce over *eight million service quality studies per month*.²⁴ Each study would involve complex calculations and data collection that ILECs would not otherwise perform.²⁵

²² LCUG Document at 17-19.

²³ *Id.* at Appendix A.

²⁴ Written Ex Parte Presentation of Southern New England Telephone Company, RM 9101, 2 (October 31, 1997) ("SNET Written Ex Parte Presentation").

²⁵ See Joint Supplemental Testimony of Fred T. Page and Michael L. Bencivengo at 5, in SNET Written Ex Parte Presentation.

B. It Would Be Manifestly Unreasonable To Incur the Costs of the Proposed Reporting and Measurement Requirements Given the Uselessness and Ineffectiveness of Many of the Measurements

These complex calculations and expensive data collection efforts will often yield useless information because many of LCUG's proposed measurement indices are flawed. The "Network Performance Parity" and "Pre-Ordering" criteria are two of many possible examples of the flawed nature of LCUG's proposal. The "Network Performance Parity" criteria attempts to monitor "whether CLEC network performance is at least at parity with ILEC network performance."²⁶ However, this measurement will depend on end users' overall performance experiences, which will be affected by both the CLEC's and the ILEC's network performances, without providing a way to differentiate between the two. Results, therefore, will be skewed by poor CLEC services even when ILEC services are of high quality.

The "Pre-Ordering" criteria purportedly measures "the time required for CLECs to obtain the pre-ordering information necessary to establish and modify service [from ILECs]."²⁷ The measurement fails to isolate ILEC responsiveness because it is dependent on the transmission path and network congestion of the carrier the CLEC chooses to use in contacting the ILEC.²⁸ Transmission path selection and network congestion in this circumstance are clearly beyond the control of the ILEC. Nonetheless, this measurement would indicate poor response time by an ILEC if problems arise.

²⁶ *Id.* at 50.

²⁷ *Id.* at 22.

²⁸ See Joint Supplemental Testimony of Fred T. Page and Michael L. Bencivengo at 3, in SNET Written Ex Parte Presentation.

C. The Proposed Reporting and Measurement Requirements Would Divert Limited ILEC Resources Away from Providing CLECs with Reasonable Access to OSS

The number of people needed to administer an ILEC OSS system and perform related administrative functions is staggering. The computer hardware and software and other equipment needed to keep up with CLEC OSS demands are prohibitively expensive. ILECs, especially mid-size ILECs, cannot expend unlimited resources to finance CLECs' ever-expanding regulatory demands when no carrier has been assured that they will be allowed to recover these costs. In fact, some CLECs argue that these costs should never be recovered.²⁹

LCUG claims that it designed its reporting and measurement requirements to foster improved access to OSS. Implementing the proposal, however, would have the opposite effect. Undertaking to gather the information and to prepare the thousands, even millions, of reporting variables LCUG proposes will shift limited resources from where they are most efficiently allocated – to actually providing reasonable access to OSS – to the production of largely wasteful paperwork. This will hamper competition, not promote it, by hindering mid-size ILECs' efforts to provide unbundled network elements and imposing burdens on one competitor without imposing them equally on competing CLECs.

If LCUG is truly interested in reasonable access to OSS, and not in crippling their competitors with excessive regulatory responsibilities, it should advocate to state commissions a focused and limited set of service quality measurements that are consistent with a particular

²⁹ See for example, Comments of MCI, Electric Lightwave, Inc., et al., Petition for Declaratory Ruling and Contingent petition for Preemption on Interconnection Cost Surcharges, CCB/CPD 97-12 (Apr. 3, 1997).

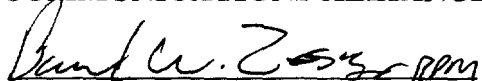
ILEC's OSS, size and other circumstances as well as with the Eighth Circuit's decision. As it stands, the LCUG proposal is impossibly burdensome and counterproductive and should be rejected.

V. CONCLUSION

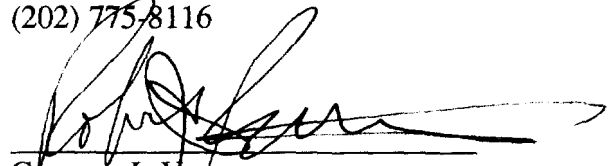
The Commission has no authority to impose the OSS standards proposed by LCI and LCUG. If the FCC nonetheless attempts to institute national OSS standards, it should not impose the same requirements on all ILECs. Mid-size carriers' unique position and limited resources must be accommodated. The Commission should further reject the LCUG "Service Quality Measurements" proposal as overly burdensome and poorly designed. Consequently, the FCC should close this docket without action.

Respectfully submitted,

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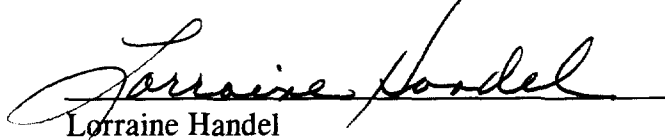
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November 17, 1997

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I hereby certify that on this 17th day of November, 1997, I caused copies of the foregoing "Ex Parte Comments of The Independent Telephone & Telecommunications Alliance" to be mailed via first-class postage prepaid mail to the following:


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